

CHAPTER 20 DEFICIENCIES AND SANCTIONS

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CHAPTER 20 DEFICIENCIES AND SANCTIONS

20.1 INTRODUCTION

As outlined in earlier chapters, Caltrans will no longer be involved in most project level reviews and approval activities. The Process Review is now Caltrans primary method of ensuring that federal and state requirements are met, (see Chapter 19, “*Oversight and Process Reviews*,” of the Local Assistance Procedures Manual [LAPM]). During a Process Review of a local agencies project files or project site, errors and/or deficiencies could be found. If that happens, federal and/or state funds may be withdrawn from a project depending on the severity and circumstance of the deficiency.

It is important to note that the formal process review is not the only method of discovering project deficiencies. Errors or deficiencies are discovered occasionally as part of the normal routine of processing of project submittals by the District Local Assistance Engineers (DLAEs) or Division of Local Assistance Area Engineers.

This chapter is intended to assist local agencies that are involved in developing local assistance projects by providing examples of the deficiencies that have been found in the past and the possible ramifications for those errors or deficiencies. It should be understood that the examples given are by no means all inclusive. The key to avoiding possible sanctions is to follow the procedures outlined in this manual, the *Local Assistance Program Guidelines* (LAPG), and the *Standard Environmental Reference* (SER), and if you have any questions to consult your DLAE.

Section 20.4, “Local Assistance Dispute Resolution Process,” of this chapter also provides means for local agency to appeal a sanction that they feel has been imposed upon them unfairly or they feel the penalty is too harsh for the error or deficiency. This appeal process is not limited to just the appeal of sanctions; it can be used by local agencies when they disagree with the decision they receive from a district office.

20.2 DEFICIENCIES

PROCEDURAL DEFICIENCIES

A Procedural Deficiency is defined as a finding that a local agency’s practices and procedures fail to demonstrate sufficient familiarity for acceptable levels of conformance with procedures and required certifications defined in the LAPM. In addition to jeopardizing federal and/or state funding on completed or ongoing projects, certifications for future projects may be conditioned, or not accepted until the deficiencies are corrected.

Examples of some of the most common procedural deficiencies (found by Caltrans) are:

- Continued submission of Request for Authorization that contains errors and omissions (see Chapter 3, “Project Authorization,” of the LAPM).
- Continued submission of Preliminary Environmental Study Form that contains errors and omissions (see Chapter 6, “Environmental Procedures,” of the LAPM).

- Continued submission of Plans, Specifications & Estimate Certifications that contains errors and omissions (see Chapter 12, “Plans, Specifications & Estimate,” of the LAPM).
- Continued submission of Right of Way Certifications that contains errors and omissions (see Chapter 13, “Right of Way,” and Chapter 14, “Utility Relocations,” of the LAPM).
- Continued submission of Local Agency Contract Award Checklist that contains errors and omissions (see Chapter 15, “Advertise and Award Project,” of the LAPM).
- Failure of the local agency to comply with the Caltrans Disadvantaged Business Enterprise (DBE) program, particularly with regard to policy, utilization of DBEs, monitoring, and reporting (see Chapter 9, “Civil Rights and Disadvantaged Business Enterprises,” of the LAPM).

MAJOR PROJECT DEFICIENCY

A Major Project Deficiency is defined as an error of commission or omission, which violates federal or state law or regulation, and if uncorrected, would prevent federal or state participation in all or a portion of the project.

Examples of some of the most common (found by Caltrans and FHWA) of Major Project Deficiencies (federal) are:

- Failure to initiate an environmental reevaluation following National Environmental Policy Act (NEPA) approval, when changes in the scope of the project are proposed, or when new project environmental impacts surface due to changes in law or investigations, shall result in loss of all or part of the federal funding for the project (see Chapter 6, “Environmental Procedures,” of the LAPM).
- Failure to fulfill mitigation commitments or adhered to restrictions identified in the approved NEPA document shall result in a loss of all or part of federal funding for the project (see Chapter 6, “Environmental Procedures,” of the LAPM).
- Right of Way activities in violation of the Uniform Relocation Assistance and Real Properties Policy Act, as amended, can result in all or partial loss of project funding. Project funding losses can result even if there are not federal funds in Right of Way but only in other phases (see Chapter 13, “Right of Way,” of the LAPM).
- Force Account/Day Labor work, without proper justification, is not reimbursable (see Chapter 12, “Plans, Specifications & Estimate,” of the LAPM).
- For Emergency Relief (ER) projects, billing for emergency opening but actually doing permanent restoration work can result in a loss of all or part of the federal funding for the project (see Chapter 11, “Disaster Assistance,” of the LAPG).

- In the absence of prior approval documentation, the use of publicly owned equipment, mandatory use of borrow/disposal sites, use of patented/proprietary materials, use of warranty/guaranties, and use of agency-furnished materials, shall make all or part of the construction phase ineligible for reimbursement with federal funds (see Chapter 12, “Plans, Specifications & Estimate,” of the LAPM)
- Failure to submit a “Material Certificate” shall result in a partial loss of funding for the construction phase. Failure to adequately document and address all exceptions to the certification will result in all or partial loss of reimbursement. Failure to implement an approved materials and testing program for the project will result in the loss of federal funds for the project (see Chapter 16, “Administer Construction Project,” and Chapter 17, “Project Completion,” of the LAPM).
- Failure to enforce the Contract DBE provisions with regard to utilization or substitution will make all or part of the construction phase ineligible for reimbursement with federal funds (see Chapter 9, “Civil Rights and Disadvantaged Business Enterprises,” of the LAPM). (*This applies to Contracts executed before May 1, 2006 with race-conscious DBE goals.*)
- Failure to maintain the completed project (roadway and appurtenances constructed with federal funds and/or mitigation sites), or portions of the project shall result in repayment of all or a portion of the federal reimbursement. (See Chapter 18, “Maintenance,” of the LAPM).

Examples of some of most common (found by Caltrans) Major Project Deficiencies (State) are:

- RTPAs that use Exchange Funds for non-Article XIX purposes or for other than projects will have to return the funds given to them (see Chapter 18, “Optional Federal Exchange and State Match Programs,” in the LAPG).
- Counties that use Exchange Funds for other the non-Article XIX purposes will have to return the funds given to them (see Chapter 18, “Optional Federal Exchange and State Match Programs,” in the LAPG).
- On Environmental Enhancement and Mitigation (EEM) projects, reimbursable costs must be invoiced for by the end of the first state fiscal year following the fiscal year, during which funds were allocated by the CTC. Failure to comply will result in loss of the federal reimbursement (see Chapter 20, “Environmental Enhancement and Mitigation,” in the LAPG).

UNRECOVERABLE PROJECT DEFICIENCY

An Unrecoverable Project Deficiency is defined as “a deficiency of such magnitude as to create doubt that the policies and objectives of Title 23 of the USC (or other applicable federal codes) will be accomplished by the project,” (quote from “PS&E Certification”) and the project has proceeded to the point that the deficiency cannot be corrected. This level of deficiency shall result in the withdrawal of all or a portion of the federal and/or state funds from the project.

Examples of some of the most common (found by Caltrans and FHWA) Unrecoverable Project Deficiencies (Federal) are:

- Projects that are not on an approved FTIP/FSTIP are not eligible for reimbursement with federal funds for any project activities prior to approval of the FTIP/FSTIP and project authorization (see Chapter 2, “Financing the Federal-Aid Highway Program,” in the LAPG.)

- Any preliminary engineering, right of way and construction activities done prior to authorization are not eligible for reimbursement (see Chapter 3, “Project Authorization,” of the LAPM)
- Violation(s) of permit requirements or conditions obtained as a requirement of the environmental process, or failure to secure required permits, or NEPA approvals will result in a loss of all or part of the federal project funding (see Chapter 6, “Environmental Procedures,” of the LAPM).
- No pre-award audit for consultant contracts of \$1 million or more.
- Consultant contract awarded, but not through competitive negotiations, when a noncompetitive negotiated contract is not warranted.
- Design work (over and above what is required for NEPA compliance) prior to NEPA approval is not eligible for reimbursement with federal funds (see Chapter 3, “Project Authorization,” Chapter 6, “Environmental Procedures,” and Chapter 12, “Plans, Specifications & Estimate,” of the LAPM).
- Failure to include required contract provisions, Form FHWA-1273 and other contract provisions - certifications, in the bid documents shall make the construction phase of the project ineligible for federal reimbursement (see Chapter 12, “Plans, Specifications & Estimate,” of the LAPM).
- Right of Way Acquisition prior to NEPA approval (except for hardship and protection with FHWA prior approval) is not eligible for federal reimbursement (see Chapter 3, “Project Authorization,” Chapter 6, “Environmental Procedures,” and Chapter 13, “Right of Way,” of the LAPM).
- Additional costs resulting from incorrect statements on Right of Way Certification are not eligible for federal reimbursement (see Chapter 13, “Right of Way,” of the LAPM).
- Failure to open the bids publicly, failure to read the bids aloud, or failure to discuss reason(s) for not reading bid(s) aloud shall make the construction phase ineligible (see Chapter 15, “Advertise and Award Project,” of the LAPM).
- Award of the construction contract to other than the lowest, responsive bidder for bids based on competition shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, “Advertise and Award Project,” of the LAPM).
- Negotiations with bidder(s) prior to award, except for force account projects, shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 12, “Plans, Specifications & Estimate,” and Chapter 15, “Advertise and Award Project,” of the LAPM).
- Award of the contract to a suspended or debarred contractor shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, “Advertise and Award Project,” of the LAPM).

- Failure of a local agency to provide adequate supervision (local agency or local agency's consultant adequately staffed and equipped to provide the construction engineering service required) to ensure the project is constructed in accordance with the plans and specifications, shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, "*Advertise and Award Project*," of the LAPM).
- When the local agency hires a consultant to provide construction-engineering services for a project, the local agency is still required to provide a full-time employee of the agency to be in responsible charge of the project. Failure to do so shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 16, "*Administer Construction Contracts*," of the LAPM).
- No public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors (see Chapter 15, "*Advertise and Award Project*," of the LAPM).
- No construction work shall be performed by convict labor at the work site or within the limits of any federal-aid highway construction project from the time of award of the contract or the start of work on force account until final acceptance of the work by the administering agency, unless it is labor performed by convicts who are on parole, supervised release or probation (see Chapter 12, "*Plans, Specifications & Estimate*," of the LAPM).
- Any contract that includes provisions that requires a contractor to give any preference in hiring (with the exception of Indians living on or near a reservation on eligible projects) shall make the contract ineligible for federal reimbursement (see Chapter 12 "*Plans, Specifications & Estimate*," of the LAPM).
- For local agencies that pay for equipment rental above approved equipment rental rates, the local agency will be responsible for the amounts above the approved rates (see Chapter 16, "*Administer Construction Project*," of the LAPM).
- Permanently incorporating steel or iron or coatings thereon from a foreign source in amounts exceeding the minimal use provisions shall make the construction phase not eligible for reimbursement with federal funds (see Chapter 12, "*Plans, Specifications & Estimate*," of the LAPM).
- For maintenance items performed by the contractor as a contract item or under a contract change order, those items shall not be eligible for federal reimbursement (see Chapter 12, "*Plans, Specifications & Estimate*," of the LAPM).
- Payments to a contractor for items of work that was designated for a DBE but performed by others, and there is no documentation for the substitution that was approved, then those items shall not be eligible for reimbursement with federal funds (see Chapter 9, "*Civil Rights and Disadvantaged Business Enterprises*," in this manual). (*This applies to Contracts executed before May 1, 2006 with race-conscious DBE goals*).
- Local agencies that do not enforce the requirement that the contractor posts all specified posters, notices, wage determinations, etc. at the job site will lose all or part of their reimbursement (see Chapter 16, "*Administer Construction Contracts*," of the LAPM).

- Local agencies that do not enforce contract requirements, whether express or implied, relating to federal statutes and/or contract provisions pertaining to nondiscrimination, nonsegregated facilities, equal opportunity, health and safety and work site safety, Title VI, Davis-Bacon Act, Copeland Act, Clean Air Act as amended, Federal Water Pollution Control Act, Lobbying Certification, Noncollusion, False Statements, Buy America, On-the Job Training, or incorporating required contract provisions in subcontracts, etc., including reporting shall result in loss of all, or part of the federal reimbursement (see Chapter 12, “Plans, Specifications & Estimate,” and Chapter 16, “Administer Construction Contracts,” of the LAPM).

Some most common examples (found by Caltrans) of Unrecoverable Project Deficiencies (State) are:

- Any capital work (right of way acquisition and construction) done on EEM and projects in advance of CTC’s allocation vote is not eligible for reimbursement (see *Financial Guidelines for Local Agency Reimbursement*, in the LAPG).

20.3 SANCTIONS

All Major Project Deficiencies (until they are corrected) and Unrecoverable Project Deficiencies require sanctions by Caltrans. Process Review Committee or DLAE shall impose one of the following sanctions, depending on the severity and circumstances of the deficiency:

- Freeze on all future programming of federal or state funds until corrective action is implemented.
- Freeze progress payments for a federal-aid project until the project’s Major Project Deficiency is corrected.
- Percentage of federal or state funds for a project withdrawn.
- All federal or state funds withdrawn from a project.

DLAE will be responsible for notifying the local agency of sanctions imposed.

Whether or not sanctions are imposed against a local agency, the local agency shall be expected to develop an action plan and implement it to correct the deficiencies. Local agencies will be given adequate time to develop and implement their action plan. Failure to correct the deficiencies in a timely manner shall be grounds for imposing additional sanctions.

20.4 LOCAL ASSISTANCE DISPUTE RESOLUTION PROCESS

The Local Assistance Dispute Resolution Process (LADRP) is an appeal process for local agencies to use when they disagree with the decision they receive from the Caltrans district office concerning their local assistance funded project on or off the State Highway System (SHS). Prompt payment rules may be suspended when the local agency enters into the LADRP.

This process is intended to address all local assistance funded project disputes off the SHS. For local assistance projects on the SHS, the LADRP is limited to disputes involving sanctions, invoices, local assistance policy or procedures, or other E-76 related issues between Caltrans and the local agency. This LADRP is not intended to address disputes involving cooperative agreement or encroachment permit requirements, project scope disagreements, design standard discrepancies, or other technical issues on SHS projects; as those disputes will be elevated for resolution by the Caltrans district office.

DISPUTE RESOLUTION PROCEDURES

If an impasse is reached between Caltrans' district and the local agency, and the local agency desires to appeal the district's decision, the following procedure is to be used:

1. The local agency submits a written request for appeal to the District Local Assistance Engineer (DLAE). The request must fully describe the project issue and explain where there is agreement and disagreement between the district and the local agency. The request should include:
 - a) A detailed statement of the local agency's position on the issue.
 - b) A detailed statement of what the local agency believes the district's position to be.
 - c) Support material for the local agency's position statement including maps, plans, receipts, invoices, draft or executed agreements, pictures, logs, and other material needed to fully explain the local agency's position regarding the disputed issue.
 - d) The DLAE may request additional information to be provided by the local agency.
2. Within two weeks of receiving the local agency's request for appeal, the DLAE will forward the local agency's request package to Caltrans headquarters' Division of Local Assistance (DLA), Office of Policy Development and Quality Assurance. The request package is to be accompanied by a district memorandum and enclosures which should include:
 - a) A description of the steps taken to resolve the issue.
 - b) A detailed discussion of the items that are in dispute with references to sections in the manuals and policy memos that support the district's position.
 - c) The district's recommendation on the disputed items.
 - d) All material provided in the local agency appeal request package.
 - e) Other information that supports the district's position such as an overview of the issue, any additional maps, plans, invoices, receipts, draft or executed agreements, pictures, logs, and other material needed to give a full explanation of the disputed issue that was not included in the local agency's appeal request package.

3. The district's appeal request memorandum and all enclosures should be sent to:

*California Department of Transportation
Division of Local Assistance
Office of Policy Development and Quality Assurance
1120 N Street, MS - 1
Sacramento, CA 95814*

4. The DLA will review the appeal request and within two weeks of receipt from the DLAE, the Chief, Division of Local Assistance, will issue one of three following written responses:

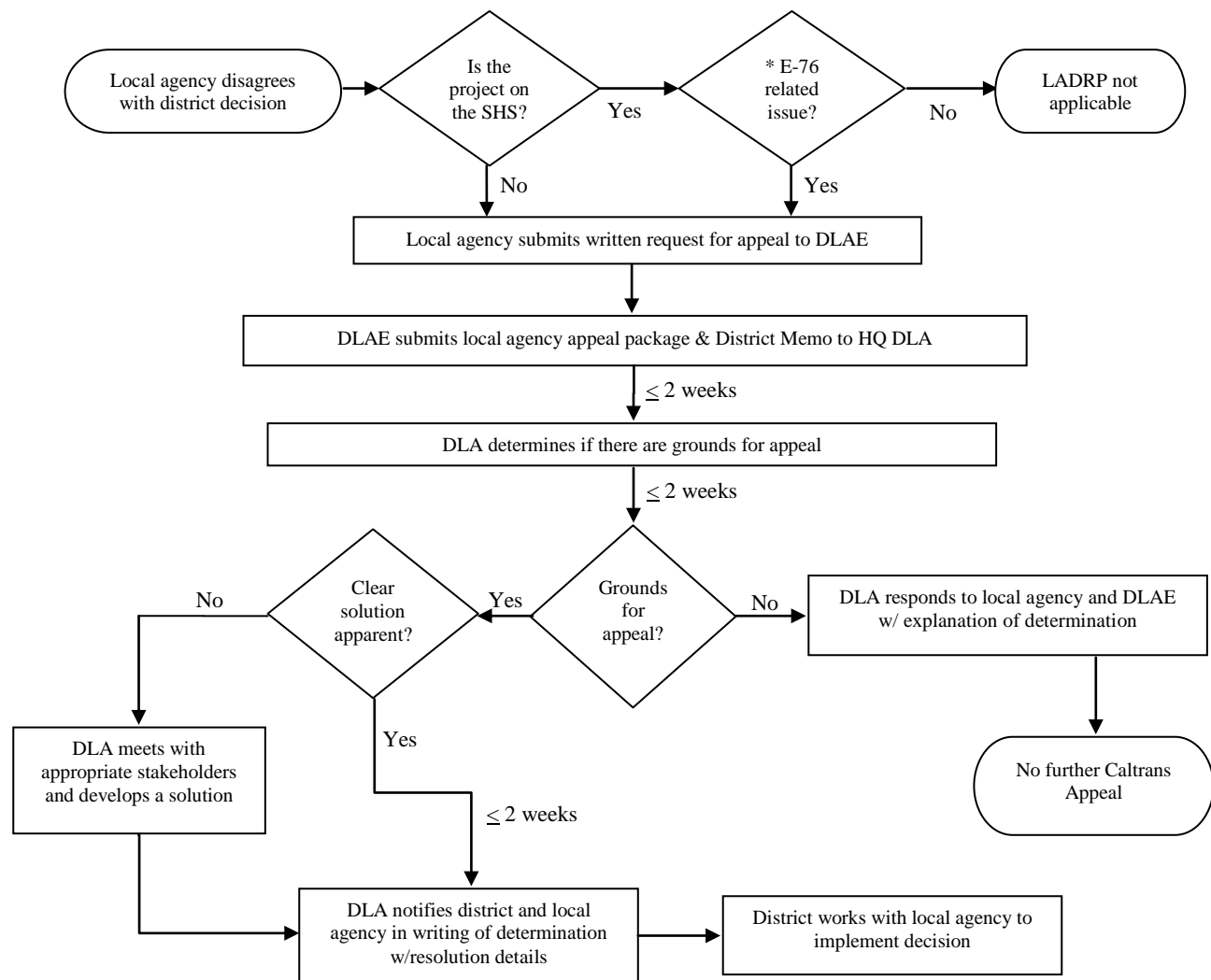
- a) If the DLA does not find sufficient grounds or merit for the appeal, a decision letter stating the reasons for denying the appeal will be sent to the local agency with a copy to the DLAE.
- b) If the DLA finds there are sufficient grounds or merit for the appeal and a clear solution is apparent, a decision letter will be sent to the local agency, with a copy to the DLAE, describing the reasons for the decision and the resolution details.
- c) If the DLA finds that sufficient grounds or merit for an appeal are evident but no clear solution is apparent, a decision letter will be sent to the local agency stating so, with a copy to the DLAE. DLA will next hold a meeting with appropriate stakeholders (local agency, district and headquarters representatives, and others the DLA believes are appropriate). At the meeting, the local agency and the district representative(s) may be asked to give a brief overview of the appeal and a discussion of the items in dispute. After evaluating all the information provided and after consultation with the necessary and appropriate parties and/or agencies; a final decision will be issued in writing notifying the local agency of the resolution details with a copy to the DLAE.

IMPLEMENTING THE DLA DECISION

If the local agency is agreeable to the decision and solution, the district will work with the local agency to implement the solution.

If the local agency is not agreeable to the determination and solution, there is no further appeal within Caltrans.

FIGURE 20-1 LOCAL ASSISTANCE DISPUTE RESOLUTION FLOWCHART



* Sanction, invoice, policy, procedure, or E-76 related issue

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